STATE OF MICHIGAN

COURT OF APPEALS

TROOPER JAKE, INC., Plaintiff-Appellee,	UNPUBLISHED August 11, 2005
v	No. 253787 Ingham Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 01-093253-CK

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Auto-Owners Insurance Company appeals as of right from the trial court's order denying its motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition in favor of plaintiff Trooper Jake, Inc., under MCR 2.116(I)(2) on the ground that Trooper Jake was entitled to interest as a matter of law. We reverse. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Auto-Owners was the insurer of Trooper Jake's commercial buildings. On June 24, 1999, a fire damaged several buildings Trooper Jake owned that were covered by the insurance policy. According to a report prepared for Auto-Owners, one building was destroyed, four buildings sustained some damage, and seven sustained little or no damage. Apparently, Trooper Jake tore down all the buildings, and the person submitting the report for Auto-Owners stated that he did not know why the seven slightly or not damaged buildings were torn down. On September 22, 1999, Trooper Jake's president submitted to Auto-Owners a "sworn statement in proof of loss" reporting that the actual cash value of loss was $650,000 but demanded $565,000 total, specifically $465,000 for the buildings and $100,000 for the renovations, with both amounts evidently being their respective policy limits. The parties disputed the total amount of loss, but on December 24, 1999, Auto-Owners paid Trooper Jake $198,398.80, which was an undisputed amount of loss.

On March 1, 2001, Trooper Jake filed a lawsuit against Auto-Owners alleging, among other things, breach of contract. During the pendency of the claim, Auto-Owners demanded an appraisal on the amount of loss in accordance with the insurance policy. The insurance policy allowed for either party to demand an appraisal of the loss if the parties could not agree on the

amount. As a result of the appraisal demand, both parties agreed to stay the above proceedings in favor of the appraisal process, and an order staying the proceedings was issued on April 5, 2001. In accordance with the insurance policy's outlined appraisal, both parties were to select an appraiser. Trooper Jake alleged that Auto-Owners' selected appraiser was not a certified commercial appraiser but merely had residential appraisal certification. Trooper Jake also asserted that Auto-Owners' selected appraiser's appraisal was substandard and rejected by the umpire (who eventually became an individual involved in the appraisal process as allowed in accordance with the insurance policy and MCL 500.2833(m)). Finally on March 20, 2003, Auto-Owners' adjuster joined Trooper Jake's appraiser and the umpire, and they unanimously determined that the value of the loss was $275,000 plus demolition costs incurred up to $56,601.20. Auto-Owners paid the appraisal award to Trooper Jake on April 18, 2003, which was within thirty days of the award. Auto-Owners then requested dismissal of the above lawsuit in a motion for summary disposition under MCR 2.116(C)(10).

At the hearing on the motion for summary disposition, the trial court asked Auto-Owners' counsel why Auto-Owners had not requested an appraisal sooner than it did. Auto-Owners' counsel replied that the appraisal was demanded as soon as the negotiations broke down. Specifically, counsel stated that the first payment was made ten months after the loss and that there was an investigation by the Lansing Fire Department because the fire was believed to be arson. Counsel explained that at times the insured's appraiser was unavailable; the two appraisers were unable to agree to a sum but decided to avoid involving an umpire; and, after a year of negotiating, it took the trial court several months to appoint an umpire after the parties could not agree on one. The trial court asked counsel whether the jury should decide if Auto-Owners acted in good faith regarding the delay in payment.

Trooper Jake's counsel stated at the hearing that he was not "claiming . . . that there[] [was] bad faith" and that "[he didn't] think [Trooper Jake was] going to go that way." However, Trooper Jake did seek five-percent common-law interest on both payments: on the first from the date of the fire to the initial payment, and on the second from the date of the first to the final award payment. Trooper Jake also stated that the insurance policy was silent on interest because the appraisal process was narrow and only determined the value of the loss. The trial court eventually stated that "the four year delay [in payment] occurred as a result of Auto Owners' neglect in asking for an appraisal in a timely fashion" and that, because the appraisers had no authority to award interest, the amount of interest was proper for the trial court to decide. Regarding whether Auto-Owners acted in good faith, the trial court noted that Auto-Owners' appraiser eventually agreed with Trooper Jake's appraiser and the umpire as to the award amount. Presumably with these facts in mind, the trial court stated that it would award Trooper Jake five-percent, common-law interest from the date of the fire, which was June 24, 1999. However, the trial court's order awarded interest from only December 24, 1999, to April 18, 2003, with the latter date being the date Auto-Owners paid the appraisal award.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10),[1] as well as all other questions of law.[2]

B. Legal Standards

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.[3] When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party.[4] Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[5] A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue on which reasonable minds could differ.[6]

C. Interest Award

Determining whether to grant interest on verdicts and judgments is governed purely by statute, and interest on judgments was not allowed at the common law.[7] However, at the common law, interest may be awarded as an element of damages.[8] In determining whether to award such interest, the focus is on whether interest it is necessary to allow full compensation.[9] Here, Trooper Jake's loss was ultimately valued by appraisers in accordance with the insurance policy and statutory requirements.[10] However, Trooper Jake argues that the appraisers had no authority to award interest, and it is undisputed that the appraisers did not award interest.

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[1] See *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

[2] See *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002).

[3] See *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[4] See *id*.

[5] See *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

[6] See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[7] See *Motyka v Detroit, Grand Haven & Milwaukee R Co*, 260 Mich 396, 398; 244 NW 897 (1932).

[8] See *Gordon Sel-Way v Spence Bros, Inc*, 438 Mich 488, 499; 475 NW2d 704 (1991).

[9] *Id*.

[10] See MCL 500.2833(m).

The decision whether to grant pre-award, prejudgment interest as an element of damages is within the arbitrator's discretion.[11] Therefore, because, absent an agreement otherwise, pre-award damage claims including interest are deemed to have been submitted to arbitration, an arbitrator's silence on interest is considered a decision not to award interest, and, therefore, a court should not intervene and award interest.[12] This Court has held that an appraisal clause similar to the one at issue is a common-law arbitration agreement.[13] Accordingly, we conclude that the trial court erred by awarding common-law interest because the decision whether to award such interest was in the appraisers' discretion.

Trooper Jake cites *Gordon Sel-Way* and *Holloway Construction Co* in an attempt to distinguish the appraisal process, which occurred in Trooper Jake's case, from common-law arbitration. Trooper Jake states that, because the appraisal process is narrow and provides only for the valuation of the loss, not a determination of interest on the loss, the trial court should determine interest on the loss. But, particularly given Trooper Jake's acknowledgement that the appraisal was a form of common-law arbitration, we see no legal basis to except this case from the rule of *Holloway Construction*.

In support of its argument that Trooper Jake is not entitled to common-law interest, Auto-Owners essentially relies on two cases. First, this Court held in *Krim v Commercial Union Assurance Co*[14] that, when an insurer and an insured settle a good-faith dispute over the amount of liability on a fire insurance claim through negotiation or resort to appraisal procedures provided for under the policy, interest is not available to the insured if the insurer pays the claim within thirty days of the ascertainment of the loss.[15] Here, it is undisputed that Auto-Owners paid Trooper Jake the appraisal award within thirty days of the determination. Thus, under *Krim*, Trooper Jake is not entitled to interest. However, the *Krim* Court noted that interest pursuant to MCL 600.6013 is triggered "when a breakdown in negotiations or a failure to comply with the findings of the panel of appraisers necessitates a lawsuit."[16] But, as stated earlier, Trooper Jake has not argued that it is entitled to statutory interest, only that it is entitled to common-law interest. Regardless, this is not a case in which a failure to comply with appraisers' findings necessitated a lawsuit given Auto-Owners' timely payment of the amount the appraisers awarded.

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[11] See *Holloway Construction Co v Oakland Co Bd of Co Commr's*, 450 Mich 608, 618; 543 NW2d 923 (1996).

[12] *Id*. at 617-618.

[13] See *Davis v Nat'l American Ins Co*, 78 Mich App 225, 232; 259 NW2d 433 (1977).

[14] *Krim v Commercial Union Assurance Co*, 94 Mich App 639; 288 NW2d 463 (1980).

[15] See *id*. at 642.

[16] *Id*.

Second, in *OJ Enterprises, Inc v Ins Co of North America*,[17] the trial court entered a judgment for the insured in the amount of the appraisal award plus six-percent interest on the award from the date the complaint was filed pursuant to MCL 600.6013.[18] However, this Court reversed the trial court's decision regarding interest, stating that the insurer did not contest the amount determined by the umpire and paid the award within the requisite number of days to avoid paying interest, and, therefore, interest under MCL 600.6013 was inappropriate.[19] While the present case involves a claim for common-law interest, not statutory interest under MCL 600.6013, *OJ Enterprises* further supports our determination that Trooper Jake is not entitled to common-law interest because it would be anomalous to allow common-law interest in this circumstance when interest is not available under MCL 600.6013.

The trial court apparently found Auto-Owners liable for interest on the value of the loss because Auto-Owners had procrastinated in paying Trooper Jake. Specifically, the trial court stated that "the four year delay [in payment] occurred as a result of defendant's neglect in asking for an appraisal in a timely fashion" and that, because the appraisers had no authority regarding interest on the award, it was proper for the trial court to decide the amount of interest. However, we believe that the delay in payment was not the result of Auto-Owners' alleged negligence. Specifically, the applicable appraisal statute states, in pertinent part, "[t]hat if the insured and insurer fail to agree on the actual cash value or amount of the loss, *either party* may make a written demand that the amount of the loss or the actual cash value be set by appraisal."[20] In this case, Trooper Jake never demanded appraisal. It was not until a year later—after Auto-Owners' initial payment and after Trooper Jake had filed suit against Auto-Owners—that Auto-Owners demanded an appraisal. Evidently, the trial court incorrectly assumed that only Auto-Owners had the authority to demand an appraisal when it asked Auto-Owners' counsel why Auto-Owners had not asked for an appraisal sooner than it did. In any event, we see no basis to charge Auto-Owners with "negligence" in violation of any duty to Trooper Jake for failing to demand appraisal at an earlier point when Trooper Jake had an equal right to demand appraisal itself.

Trooper Jake next argues that Auto-Owners acted in bad faith and, therefore, *Krim* and *OJ Enterprises* are inapplicable. Indeed, the trial court stated that "good faith is a factor" in *Krim*. Specifically, the trial court noted that Auto-Owners' appraiser joined Trooper Jake's appraiser and the umpire in rendering a unanimous award. Evidently, the trial court believed that Auto-Owners' appraiser joining Trooper Jake and the umpire was evidence of Auto-Owners' dilatory intent. However, if the trial court were to have rested its decision on bad faith, then MCL 500.2006 is controlling in determining the amount of interest. The statute essentially provides for a twelve-percent penalty to be assessed only against insurers who procrastinate in

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[17] *OJ Enterprises, Inc v Ins Co of North America*, 96 Mich App 271; 292 NW2d 207 (1980).

[18] *Id*. at 273.

[19] *Id*. at 275.

[20] MCL 500.2833(m) (emphasis added).

paying meritorious claims.[21] However, this Court noted in *OJ Enterprises* that the Legislature would not have enacted this statute to penalize insurers from using the appraisal process when the amount of loss is disputed by both parties.[22]

Here, we believe that Trooper Jake is not entitled to penalty interest because the amount due the insured was reasonably in dispute and did not become certain until after the appraisal concluded. In addition, the amount was paid within the sixty-day time frame allowed in the statute after "satisfactory proof of loss" is received by the insurer, e.g., a concluded appraisal.[23] Accordingly, there is no basis for a finding of bad faith where payment was timely made after the conclusion of the appraisal process. Further, even Trooper Jake acknowledged below the lack of a basis for charging Auto-Owners with bad faith. During the summary disposition hearing, Trooper Jake's counsel stated, "I'm not here today claiming . . . that there's bad faith, and I don't think we're going to go that way. And I only want five percent interest, the common law interest."

Finally, Trooper Jake argues that as a matter of equity, the trial court's order should be affirmed. However, we consider the cases Trooper Jake relies on in this regard to be readily distinguishable because they involve particularized situations that are inapposite to the present insurance dispute context.[24]

Reversed and remanded for entry of judgment in favor of Auto-Owners on the question of Trooper Jake's entitlement to common law interest. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

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[21] See *OJ Enterprises, supra* at 274.

[22] See *id*. at 274.

[23] MCL 500.2006(4).

[24] See *Thomas v Thomas*, 176 Mich App 90; 439 NW2d 270 (1989) (divorce case involving interest on the spouse's law degree); *Giannetti v Cornillie (On Remand)*, 209 Mich App 96; 530 NW2d 121 (1995) (equitable interest in conjunction with specific performance); *Keen v Keen*, 194 Mich App 72; 486 NW2d 105 (1992) (interest in divorce case awarded on the arrearages of spouse's military pension).